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In the Supreme Court of the United States

October Term, 1948

No. 803

UNITED STATES OF AMERICA, *Petitioner*

v.

25.406 ACRES OF LAND, MORE OR LESS, SITUATE IN ARLINGTON COUNTY, STATE OF VIRGINIA, AND A. M. NEVIUS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment entered in this case on February 21, 1949, by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The District Court wrote a memorandum opinion (R. 100-105) which has not been reported. The opinion of the Court of Appeals (R. 166-173) is reported at 172 F. 2d 990.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1949 (R. 174). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether, in a proceeding to determine the value of vacant, undeveloped land taken by the United States, the future anticipated profits of a prospective enterprise projected upon the land may be admitted, "not as evidence of value, but as a matter considered by the witnesses."

STATEMENT

On May 28, 1947, the United States instituted condemnation proceedings to acquire 25.406 acres of land in Arlington County, Virginia, as a site for a veterans' hospital. On June 6, 1947, a declaration of taking was filed and $850,827 was deposited as estimated compensation.

In a trial before a jury in February 1948, a verdict of $1,600,000 was returned. The question here relates to the method by which respondents were permitted to prove value. At the time of the taking the respondents, the Nevius Associates, owned the property involved. It is vacant, unimproved land, lying just across the Potomac River from Washington, opposite the Lincoln Memorial and near the terminus of the Memorial Bridge in Arlington County, Virginia (R. 19-21).

Experts for the Government in valuing the property considered the location and character of the property, its adaptability for 12-story apartment usage, and sales of other property in the vicinity. The opinions of the witnesses for the Government were based upon market value of property in the vicinity and ranged from 70¢ to 75¢ per square foot, or a total of from $775,000 to $825,000. (R. 1-3, 4-8, 12-20, 21-24, 26, 27-28.)

Respondents were permitted to introduce in evidence a plan for the development of the property by the creation of a high-class neighborhood with eight elevator apartments, an apartment hotel, stores, shops, garages, etc.* They took the view that testimony of the capitalization of the estimated yearly income from the operation of the anticipated project was admissible as one of the elements considered in forming an opinion of value. By this method a certain proportion of the yearly anticipated net income from the operation of the future project is attributed to the land as anticipated yearly income from the land. This so-called "yield of the land" is capitalized in perpetuity to obtain an estimated value of the land, designated "land residual value."

The first valuation witness for respondents testified in great detail as to the anticipated costs of the future project, the estimated rentals for 968 pro-

* The testimony indicated that the plans were drawn up, but that no final agreement had been entered into for the financing or construction of the project (R. 78-79).

posed apartment units, the estimated revenue from the operation of the prospective hotel of 286 suites, the estimated additional revenue to be derived from 750 automobile garage stalls and from store rentals and dining room profits in the operation of the hotel dining room (R. 48-55).

Respondents' witnesses Babcock, Davis and Winston all capitalized the anticipated net income from the prospective enterprise, and considered the so-called land residual value obtained by a capitalization of the estimated income attributed to the land. Based upon a consideration of this element, the character, size and location of the land, and sales of property in Washington, D. C., at Scott Circle, Dupont Circle and Massachusetts Avenue at 21st and 22nd Streets, respondents' witnesses valued the land at from $2.50 to $6.00 per square foot, or from approximately $2,500,000 to $6,000,000. (R. 39-56, 58-80, 82-89.)

The Government resisted admission of respondents' testimony of capitalization of anticipated income from the prospective project as an improper element for consideration in valuing vacant land by objections to the testimony, by motions to strike, and by requested charges. All of these objections were overruled. (R. 35, 36-37, 51, 55, 75-76, 81-82, 88, 92-93, 94-95). The Government's motion to set aside the verdict was denied May 12, 1948. (R. 100.) Judgment in the verdict was entered July 6, 1948 (R. 105-107). The Court of

Appeals affirmed in an opinion announced February 21, 1949.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that it was not improper for the trial court to admit in evidence the opinions of expert witnesses as to anticipated future profits from a prospective enterprise, in a federal eminent domain proceeding to determine compensation for the taking of vacant land.

2. In holding that the admission of estimated future profits in evidence was within the scope of discretion of the trial judge.

3. In affirming the District Court's entry of judgment in favor of respondents.

REASONS FOR GRANTING THE WRIT

Contrary to the established rule in eminent domain, the court below has permitted the admission in evidence of expert opinion as to the estimated profits to be derived from a prospective enterprise projected upon the land taken by the Government, and also as to the amount of such profits attributable to the land on account of estimated income from the land itself. Respondents' witnesses gave their opinions of the present money value of the future anticipated profits from an unrealized plan for the development of vacant land into a high-class apartment and apartment hotel project with

its own surrounding high-class neighborhood, and the jury was allowed to consider this detailed testimony.

1. a. In admitting the testimony for consideration in formulating an opinion of the value of vacant land, the lower court departed from sound principles of eminent domain valuation, as well as well-settled legal precedent. Anticipated earnings from a prospective use of land have generally been held irrelevant to the issue of the market value of vacant land, and not admissible in evidence because they are speculative, depend largely on other factors than the value of the land itself, and really represent an appraisement of the present money value of the anticipated profits and not the market value of the land itself as of the date of taking. Furthermore, even assuming the infallibility of profit prediction, it is obvious that a figure devised by a capitalization of the income ascribed to the land from the capitalized profits of the enterprise is not evidence of the current market value of vacant land but of a value of the land as enhanced by the prospective going enterprise. Such a figure is also objectionable for the additional reason that it includes business profits, and usually contains the elements of business loss and frustration which are not compensable items in federal eminent domain proceedings.

For these reasons, the federal courts and the bulk of the state courts have refused to permit

evidence of anticipated profits on *prospective* projects, and have laid down a flat rule of exclusion. *United States* v. *Boston, C. C. and N. Y. Canal Co.*, 271 Fed. 877 (C. A. 1); *United States* v. *Meyer*, 113 F. 2d 387, 397 (C. A. 7), certiorari denied, 311 U. S. 706; *United States* v. *3.544 Acres of Land in Philadelphia County*, 147 F. 2d 596 (C. A. 3); *United States* v. *Certain Parcels of Land in Rapides Parish*, 149 F. 2d 81, 82 (C. A. 5); *Bank of Edenton* v. *United States*, 152 F. 2d 251, 253 (C. A. 4); *Spring Val. Waterworks* v. *City and County of San Francisco*, 192 Fed. 137, 163 (C. C. N. D. Cal.); *United States* v. *13.40 Acres of Land in City of Richmond*, 56 F. Supp. 535, 538 (N. D. Cal.); *San Diego Land etc. Co.* v. *Neale*, 88 Cal. 50; *Central Georgia Power Co.* v. *Stone*, 139 Ga. 416; *The People* v. *Paisley*, 288 Ill. 310; *Burt* v. *Wigglesworth*, 117 Mass. 302; *Greenspan* v. *County of Norfolk*, 264 Mass. 9; *Ringwood Co.* v. *North Jersey D. W. S. Comm.*, 105 N. J. L. 165; *Matter of City of New York (Blackwell's Island Bridge)*, 118 App. Div. (N. Y.) 272; *Hamilton* v. *Railroad Co.*, 190 Pa. 51; *Kossler* v. *Railway Co.*, 208 Pa. 50; *Richmond & P. Electric Ry. Co.* v. *Seaboard Air Line Ry. Co.*, 103 Va. 399; *Strouds Creek & M. R. Co.* v. *Herold*, 45 S. E. 2d 513. Cf. *Sharp* v. *United States*, 191 U. S. 341, 348; *United Gas Co.* v. *R. R. Comm'n*, 278 U. S. 300, 318; *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391, 396 (C. A. 2). The recognized commentators in

this field have taken the same position. 1 Bonbright, *Valuation of Property* (1937), pp. 429-431; Orgel, *Valuation under Eminent Domain* (1936), secs. 160-161, 173, 184; 2 Lewis, *Eminent Domain* (3d ed. 1909), secs. 654, 709, 727; 2 Nichols, *Eminent Domain* (2d ed. 1917), secs. 445, 453.

The fact that the court below concluded that the testimony in question "related not to the nebulous cost of constructing a vague hypothetical project and the estimated income to be derived therefrom, but to the cost and expected income of a project which, according to the evidence, was definitely in the process of achievement," (R. 168), does not take the project out of the category of "hypothetical" or "prospective," nor the testimony out of the realm of speculation as to future anticipated profits. The important factors, outlined above, which have led to the firm rule that all testimony as to future profits is inadmissible plainly apply even though the unrealized enterprise may be "definitely in the process of achievement." Cf. *United States* v. *Boston, C. C. & N. Y. Canal Co.*, 271 Fed. 877, 884-6 (C. A. 1) (canal already in existence).

b. The Court of Appeals also relied on the fact that the testimony as to the estimated income "was admitted, not as evidence of value * * * , but as a matter considered by the witness in arriving at the estimate of value * * *"; that "Testimony as to

value would be worth little or nothing, if witnesses were not allowed to explain to the jury * * * the reasoning by which they have arrived at the expert opinion to which they testify * * *"; and that "the scope of such examination is a matter properly committed to the sound discretion of the trial judge * * *." (R. 169-170.)

But the court's approval of the admission of the testimony "not as evidence of value * * *, but as a matter considered by the witness in arriving at the estimate of value," does not change the effect as a precedent of the ruling that the estimated profits were admissible; rather, it opens the door to their invariable admission before the jury under such guise, in spite of the fact that this type of testimony is irrelevant and incompetent. The attempted distinction is insubstantial and misleading. If income can be used to test the opinion of an expert as to the value of the land, it can hardly be said that income is not being used as evidence of value. Matters testified to by an expert in arriving at his estimate of market value in an eminent domain proceeding must be proper elements of just compensation. A proper element of value is based upon competent evidence, and items which are not relevant in measuring compensation must be completely withheld from the consideration of the jury. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377; *Kinter* v. *United States*, 156 F. 2d 5, 7 (C. A.

3). Were it otherwise, incompetent elements in measuring just compensation—such as consequential damages, business losses, or enhancement in value due to the project—could enter into the expert's opinion of value and the evidence be rendered competent and introduced before the jury by the mere device of admitting it, "not as evidence of value, but as matter considered by the witness."

Similarly, the admission of such testimony cannot be rested on the District Court's discretion, for a trial judge has no discretion to admit testimony as bearing on value "to be considered only as a factor", which is incompetent and inadmissible as direct evidence of market value. *Kinter* v. *United States,* 156 F. 2d 5, 7 (C. A. 3). In that case, the court reversed because of the admission of evidence of cost of repairs and improvements, even though the jury was instructed that such costs were to be considered "only as a factor along with all the other evidence." And in *Greenspan* v. *County of Norfolk,* 264 Mass. 9, 12, such a charge was held not to cure the error in admitting evidence of anticipated income from a proposed development, because "The petitioner could not introduce such evidence under the guise of reasons which the witness gave in support of his opinion." Furthermore, once the testimony is admitted, unless it is excluded from the consideration of the jury by the court's instruction, it is before the jury and no one can say how much it influences its verdict. *San Diego Land*

etc. Co. v. *Neale,* 88 Cal. 50, 61-62; *Central Georgia Power Co.* v. *Stone,* 139 Ga. 416, 421; Orgel, *Valuation Under Eminent Domain* (1936) secs. 131, 162. Nor could the fact that a trial court gave a proper charge on what constitutes market value negate the error. A correct general charge on the principles of eminent domain and market value could hardly effect the necessary cure. *Throckmorton* v. *Holt,* 180 U. S. 552, 567; *Knickerbocker Trust Co.* v. *Evans,* 188 Fed. 549, 567 (C. A. 1); *Hamilton* v. *Railroad Co.,* 190 Pa. 51, 61-62.

2. The decision below is in conflict with the holdings in *United States* v. *Meyer,* 113 F. 2d 387 (C. A. 7), certiorari denied, 311 U. S. 706, and in *United States* v. *Boston, C. C. & N. Y. Canal Co.,* 271 Fed. 877 (C. A. 1). In the *Meyer* case, the Court of Appeals for the Seventh Circuit squarely held, in an eminent domain proceeding, that the material question was the market value of the land, and that "past profits and probable future profits are too conjectural to furnish any basis for determination of value" (p. 397). And in the *Boston Canal Co.* case, it was held by the Court of Appeals for the First Circuit that the probable future tonnage of the already existing canal and the additional revenue to be derived, in view of such increased tonnage, were not proper subjects of opinion evidence (pp. 884-886). In the present case, on the other hand, the Court of Appeals concluded that it was not error for the trial court to admit testimony as

to the estimated profits from the prospective apartment-and-hotel development projected by respondents, the plans for which had not even come to fruition. Thus, there is again presented here, by way of a conflict, the question which this Court found it unnecessary to pass upon in *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 285:— whether the profits attributable to respondents' hypothetical enterprise should be excluded for the reason that they are too speculative.*

The decisions of the Fourth Circuit itself seem contradictory. In *Bank of Edenton* v. *United States,* 152 F. 2d 251, 253 (C. A. 4), the court refused to approve the admission, to show acreage value, of evidence as to divisibility of the land into lots and the prices at which such lots could be sold. Such evidence does not contain the element of anticipated profits from a business enterprise, as does the evidence admitted in the instant proceeding. Nevertheless, the court approved the admission in the present case.

3. Whether such speculative evidence is to be admitted in condemnation cases is a question of considerable importance to the United States, which at the present time is engaged in condemning 9,382,643.74 acres of land, involving deposits totaling $33,611,166.60, for flood control, irrigation, and other public purposes. The problem is particularly

* Cf. *United States* v. *Waterhouse,* 132 F. 2d 699 (C. A. 9), affirmed by an equally divided Court, 321 U. S. 743.

pertinent at this time because of the extensive condemnation of land for dam and power site projects. The Government is repeatedly confronted with attempts of private landowners to inject into the valuation proceedings grandiose plans for the development of unimproved property, the value to be determined by the capitalization of prospective profits. The instant ruling opens the door to unlimited speculation of that character, with resultant inflated verdicts as in the present proceeding.

CONCLUSION

The decision below is in conflict with those of other Courts of Appeals which we believe to be correct. The question is one of importance. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

MAY, 1949.

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